IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

DWIGHT DURAN *et al.*,

Plaintiffs,

v. Civ. No. 77-721 KG/KK

BRUCE KING, *et al.*,

Defendants.

PLAINTIFFS' MOTION
FOR EMERGENCY DECLARATORY AND INJUNCTIVE RELIEF,
FOR A FINDING OF CONTEMPT AND
FOR ORDERS IMPOSING COERCIVE AND COMPENSATORY REMEDIAL RELIEF

COMES NOW the plaintiff class, by counsel, pursuant to the Court's inherent powers to enforce its orders, and hereby moves this Court for:

1. a declaration that defendants have been, and currently are, violating this Court's stipulated order of September 20, 1991;
2. emergency injunctive relief to restrain defendants from violating the order and to remedy the violation;
3. a finding that the defendants are, and have been, in contempt of court; and
4. remedial orders that will (a) coerce the defendants into promptly complying with this Court's orders, and, (b) after discovery and a future evidentiary hearing regarding the harms suffered by class members, grant members of the plaintiff class remedial injunctive relief to make them whole for the harms they have suffered due to defendants' violations of the Court's orders.

I. Background

This case is a class action brought in 1977 to remedy violations of the constitutional rights of people housed in the New Mexico prison system. Beginning in 1980, this Court approved a series of stipulated orders, commonly referred to in the aggregate as the "Duran Consent Decree" (hereafter "Consent Decree"), which mandated numerous improvements to the conditions within New Mexico's state prison system. By agreement of the parties, the Court entered an order on July 14, 1980, defining the class of persons who are the beneficiaries of the Court's orders as follows: "all those inmates who are now, or in the future may be, incarcerated in the Penitentiary of New Mexico at Santa Fe or at any maximum, close, or medium security facility open for operation by the State of New Mexico after June 12, 1980." *Duran v. Carruthers*, 678 F. Supp. 839, 841 (D.N.M. 1988).

In December 1985, the plaintiff class filed a motion seeking a finding of contempt against defendants for noncompliance with the Consent Decree. That same month, defendants filed a motion to vacate portions of the 1980 Consent Decree. In December 1986, the Court heard extensive testimony relating to the parties' December 1985 motions. On February 6, 1987, while the 1985 motions were pending decision, defendants filed a motion seeking to modify a single provision of the Consent Decree; the prohibition against housing, at all of the prisons subject to the Court's orders in this case, more than one prisoner in a cell designed for single occupancy. Defendants subsequently gave notice of their intent to withdraw, without prejudice, that motion to modify the single celling provision, and withdrawal of that motion was granted in the Court's order of June 4, 1987.

On June 12, 1987, defendants filed a motion to vacate the Consent Decree in its entirety, asserting that principles of federalism should render the stipulated orders invalid. The motion to vacate the Consent Decree was denied by the late Judge Juan Burciaga in *Duran v. Carruthers*, 678 F. Supp. 839, 842 (D.N.M. 1988). The Tenth Circuit affirmed the district court in *Duran v. Carruthers*, 885 F.2d 1485 (10th Cir. N.M. 1989), and the Supreme Court denied defendants' petition for writ of certiorari in *Carruthers v. Duran*, 493 U.S. 1056, 110 S. Ct. 865, 107 L. Ed. 2d 949, 1990 U.S. LEXIS 612, 58 U.S.L.W. 3468 (January 22, 1990)

Thereafter, the court ordered the parties into settlement negotiations and, on June 10, 1991, the parties entered into a settlement agreement resolving all pending motions. The Court then adopted that stipulation as an order of the Court on Sept. 20, 1991. Doc. 1748. That is the court order that the defendants have been, and currently are, violating.

II. Defendants Are Currently Violating An Unambiguous Federal Court Order

The 1991 stipulated settlement agreement ("settlement agreement") provides in pertinent part, "defendants agree that they will not assign more than one prisoner to a cell in Existing Facilities." settlement agreement ¶ II. F.i, at p. 7. The settlement agreement defines "Existing Facility" as "any facility which is in existence on the Effective Date of this Settlement Agreement." *Id*. at p. 2.

On December 9, 2015, Mr. Barry Holloway, a class member housed at the Western New Mexico Correctional Facility (WNMCF) in Grants, New Mexico, filed with the Court three *pro se* motions; a Motion for Emergency Injunction (Doc. 2692), a Motion for Appointment of Counsel (Doc. 2693)[1] and a Motion for Contempt (Doc. 2694). The gravamen of Mr. Holloway's two substantive motions (Docs. 2692 and 2694) was that, during 2015, defendants had begun assigning more than one prisoner classified by the Corrections Department at the

[1] On February 19, 2016, the Court denied the motion for appointment of counsel on the ground that class counsel has been appointed by this court to represent the Plaintiff class with respect to any claims for injunctive relief that fall within the ambit of this Court's orders in the instant case. See Doc. 2726.

security classification of "Level 3" (medium custody) to share single occupancy cells at WNMCF, an Existing Facility, in violation of ¶ II. F.i of the 1991 settlement agreement.

Thereafter, the lawyers appointed by this Court to represent the plaintiff class contacted lawyers in the Office of General Counsel for the New Mexico Corrections Department (NMCD) and arranged a meeting to discuss the allegations made by Mr. Holloway. During the January 6, 2016 meeting, NMCD officials acknowledged that, during 2015, defendants had been assigning two Level 3 (medium custody) prisoners to share single occupancy cells at WNMCF. During the meeting, the sole justification offered by defendants for "double-celling" Level 3 prisoners in single occupancy cells was that the WNMCF facility was undergoing remodeling to improve the heating and cooling ("HVAC") systems in the buildings that house prisoners. Defendants' counsel asserted during the meeting that the remodeling project constituted an "emergency" pursuant to ¶ H.2.ii of the settlement agreement. Plaintiffs' counsel stated that the remodeling project does not fall within the definition of an "emergency" ("a circumstance caused by a riot, fire or similar event not caused intentionally by the defendants . . . that makes compliance . . . impossible, extraordinarily difficult or infeasible" ¶ H.2.ii). Plaintiffs' counsel also pointed out that, in order to invoke the emergency provisions of the settlement, the defendants were required to notify counsel for the plaintiff class "of the reasons that justified the suspension of any provision that establishes population limits." ¶ II. H.2.i. No such notice was ever issued. Plaintiffs' counsel also stated that, in light of the fact that the allegations made by Mr. Holloway were true, the defendants were currently violating the federal court's order, urging the defendants to immediately desist.

However, the January 6, 2016 meeting revealed a much more serious violation of the 1991 settlement agreement than the one alleged in Mr. Holloway's *pro se* motions. It was disclosed by NMCD officials that, since approximately *1999*, the defendants had been assigning two prisoners to single occupancy cells in Housing Units 1, 2 and 4 at WNMCF.

The sole rationale offered by defendants for the practice of assigning two prisoners to share single cells at WNMCF was that the defendants were assigning into those single cells prisoners who had been classified at Level 2 (minimum custody). Plaintiffs' counsel explained at the January 6, 2016 meeting that defendants' asserted position misconstrued the settlement agreement, and that the classification level of a prisoner assigned to share a single cell in an Existing Facility is irrelevant. It was then agreed that counsel for the plaintiffs would conduct an inspection of the situation at WNMCF to ascertain the magnitude of, and the effects of, the double-celling.

On January 15, 2016, United States Magistrate Judge Kirtan Khalsa conducted a telephonic status conference to discus the *pro se* motions with counsel for the parties. During the call, NMCD's General Counsel stated that, since the January 6 meeting, defendants had endeavored to move all Level 3 prisoners at WNMCF into single cells and that he believed that, at the time of the status conference, no Level 3 prisoner was being double celled in a single occupancy cell at WNMCF. During the conference, plaintiffs' counsel apprised the Court of the revelation that Level 2 prisoners were being double-celled in single occupancy cells at WNMCF since 1999, and defendants' representatives asserted that their practices did not violate the prohibition of ¶ II. F.i., since the on-going double celling only involved Level 2 inmates.

On February 8, 2016, counsel for the plaintiff class inspected WNMCF together with numerous NMCD officials and their counsel. The inspection confirmed that the Level 3 prisoners who had been assigned to share single cells had been returned to single occupancy housing arrangements in Housing Units 5, 6 and 7. However, the inspection also revealed that defendants have retrofitted *every cell* at WNMCF by bolting one or two additional bunks to the walls above the original beds. Each single occupancy cell at WNMCF now has two bunks in it, and the larger 120 square foot cells in Housing Unit 3 (referred to in ¶ II. G of the settlement agreement as "S pod"), that were designed to house two prisoners, now have four bunks in them.

The February 8, 2016 inspection further revealed that two prisoners are currently assigned to share single occupancy cells in Housing Units 1 and 4.[2] Defendants' representatives stated that thirty-two prisoners were then sharing single occupancy cells. Plaintiffs' representatives again stated that the practice of assigning two level 2 prisoners to share a single occupancy cell within WNMCF violates the 1991 court order and that, if the defendants did not halt the practice by the time of the next status conference with Judge Khalsa on February 16, 2016, class counsel would need to file an emergency motion seeking a restraining order prohibiting the assignment of two prisoners to share single occupancy cells.

At the February 16, 2016, status conference conducted by Judge Khalsa, defendants' counsel acknowledged that they are still housing two Level 2 prisoners in single occupancy cells at WNMCF. At that time, defendants' representatives specified for the first time the basis for asserting that their on-going practice of assigning two minimum custody prisoners to share a single occupancy cell is permitted under the 1991 order. Defendants' counsel cited ¶ IV. A, which provides "Nothing in this Settlement Agreement shall be construed to extend the application of the Modified Decree to any prisoner, other than a prisoner assigned to a medium, close or maximum security facility." Plaintiffs' counsel disagreed with that analysis, stating to the Court that the clause cited by defendants' counsel merely clarifies that only members of the plaintiff class (inmates . . . incarcerated in . . . any maximum, close, or medium security facility") are beneficiaries of the 1991 settlement agreement.

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[2] Housing Unit 2 is vacant while NMCD conducts the HVAC improvement project there.

Defendants' reference to ¶ IV has no merit because:

1. The parties indisputably intended the 1991 settlement agreement to apply to WNMCF. The 1991 settlement agreement specifically refers to the WNMCF facility in ¶ II. G and ¶ III. D;

2. WNMCF is an Existing Facility that was "in existence on the Effective Date of this Settlement Agreement;"

3. WNMCF was constructed as a medium custody facility, although it has commonly housed some minimum custody prisoners throughout its existence; and

4. Since 1980, it has been common for NMCD facilities, including the Penitentiary of New Mexico in Santa Fe, to house some minimum custody prisoners. The law of the case has been established for decades that minimum custody prisoners housed in every Existing Facility are members of the plaintiff class and are beneficiaries of the 1991 settlement agreement.

II. The Violation Of The Court's 1991 Order Constitutes Contempt

Federal courts have the power to hold a party in civil contempt for failing to comply with any court order. Federal courts have held that, in order to safeguard its authority and to vindicate the rights of the litigants, a federal court has not only the right, but also the obligation to prevent violations of its orders, *See Aspira of New York, Inc. v. Board of Education* 423 F.Supp. 647 (S.D.N.Y. 1979). "[t]he court is obliged . . . to require substantial performance [of its orders] and due diligence [on the part of defendants]," *Id.* at 651. In another longstanding complex class action regarding penal institutions, *Harris v. City of Philadelphia*, 47 F.3d 1311, (3d Cir. 1995), the Third Circuit affirmed the trial court's contempt finding, stating, "A party may not rely on its unilateral interpretation of the requirements for compliance in complex institutional reform litigation as an excuse for noncompliance.” *Id.* at 1324-25.

More recently, in a case involving the prison system in Puerto Rico, the court stated:

> Intentional or willful disobedience of the order need not be shown to establish civil contempt. Star Fin. Servs. Inc. v. AASTAR Mortg. Corp., 89 F.3d 5, 10 (1st Cir.1996) ("An act does not cease to be a violation of law and of a decree merely because it may have been done innocently."); Vuitton et Fils S.A. v. Carousel Handbags, 592 F.2d 126, 128 n. 2 (2nd Cir.1979) ("The fact that the prohibited act was done inadvertently or in good faith, however, does not preclude a citation for civil contempt, for the sanction is remedial in nature."); Select Creations, Inc. v. Paliafito America, Inc., 906 F.Supp. 1251, 1272 (E.D.Wis.1995) ("[A] civil contempt may be established even though the failure to comply with the Court's order was unintentional or done with good intentions").

Morales Feliciano v. Acevedo Vila, 2007 U.S. Dist. LEXIS 91669, *34 (D.P.R. Dec. 13, 2007).

No matter their rationale, defendants’ long-standing practice of assigning two prisoners to share single cells at WNMCF requires a finding of contempt.

III. Assigning Two Prisoners To Share Single Occupancy Cells Is Causing Irreparable Harm

Prisoners housed at WNMCF have been, and currently are, being assigned to share single occupancy rooms at WNMCF, in violation of the federal court order to which defendants stipulated. Defendants’ practice violates a federal court order and also violates the contractual rights of every class member who has been double celled. The 1991 settlement agreement provides, *inter alia*, “Paragraph F.i shall be enforceable in any federal or state court of competent jurisdiction. In addition, Paragraph F.i shall be specifically enforceable under New Mexico law in the courts of the State of New Mexico as a binding contractual agreement.” 1991 settlement agreement in ¶ II. F.ii. Class members are being denied the benefits of the 1991 settlement agreement, and they have no adequate remedy at law for the harm they are currently suffering.

If an injunction is not issued, the overcrowded prisoners will be subjected to numerous harms; including emotional distress, fistfights and bodily injuries, denial of humane living conditions, excessive heat and loss of out of cell time. See Exhibit 1, declarations of prisoners who have been assigned to share single occupancy cells at WNMCF.

IV. Plaintiffs Are Entitled To Emergency Remedial Relief

In order to obtain a preliminary injunction, the moving party must establish (1) substantial likelihood that the movant will eventually prevail on the merits; (2) a showing that the movant will suffer irreparable injury unless the injunction issues; (3) proof that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) a showing that the injunction, if issued, would not be adverse to the public interest. *Lundgrin v. Claytor*, 619 F.2d 61, 63 (10th Cir. 1980).[3] A showing of probable irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction. *Dominion Video Satellite, Inc. v. EchoStar Satellite Corp.*, 356 F.3d 1256, 1260 (10th Cir. Colo. 2004)

A. Plaintiffs are likely to prevail on the merits

The analysis set forth above regarding the proper construction of the 1991 settlement agreement makes clear that defendants' practice of assigning two prisoners to share single occupancy cells at WNMCF violates Paragraph II. F.i of the 1991 settlement agreement. Moreover, given that no facts are in dispute, the Court can now adjudicate with finality the

[3] The Tenth Circuit has adopted a modified requirement as to the likelihood of success. If the movant has established requirements (2), (3), and (4) for a preliminary injunction (above), the movant may satisfy requirement (1) (likelihood of success on the merits) by showing that questions going to the merits are so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation. *See Walmer v. United States Dep't of Defense*, 52 F.3d 851, 854 (10th Cir. 1995). See also *Federal Lands Legal Consortium v. United States*, 195 F.3d 1190, 1194-1195 (10th Cir. N.M. 1999)

matter at issue, whether defendants may lawfully assign two prisoners to single occupancy cells in an Existing Facility if the prisoners' security classification is lower than medium custody.

B. Members of the plaintiff class will continue to suffer irreparable injury if they remain double-celled in single occupancy cells

Exhibit 1 is comprised of sworn declarations by class members who have been subjected to double celling at WNMCF. The harms that they have suffered, and continue to suffer, include unnecessary emotional distress, exacerbation of medical and/or mental health conditions, unsafe mixing of incompatible inmates, fights and bodily injuries among the overcrowded prisoners, denial of humane living conditions, excessive heat, loss of out of cell time, and improper misconduct reports.

Additionally, the denial of the benefits of the federal court order requiring single celling is, itself, a form of irreparable harm, since money damages are an insufficient remedy for the ongoing suffering resulting from the unlawful overcrowding.

C. The injuries suffered by the class members who are double celled outweigh any harm that defendants might suffer if the injunction is entered

Defendants have not asserted any form of harm that would result if prisoners at WNMCF are housed one to a cell. Additionally, the February 8, 2016 inspection of WNMCF revealed that some "pods" in Housing Unit 4 are currently vacant and that some cells are vacant. No harm to defendants would result from moving double celled prisoners into those empty cells.

D. An injunction would not be adverse to the public interest

The public has a general interest in having public officials abide by applicable laws. Moreover, the public interest is served when citizens who are incarcerated receive humane conditions of confinement and do not return to society traumatized and embittered by their experiences while incarcerated.

WHEREFORE, Plaintiffs request that the Court:

1. Declare that the defendants' practice of assigning two prisoners to share a single occupancy cell in an Existing Facility violates the 1991 settlement agreement, irrespective of the custody classification Level of the people assigned to share a single cell.

2. Order the defendants to:

   a. Immediately desist the practice of assigning more than one prisoner to any cell at WNMCF that was not originally built for the purpose of housing two prisoners; and

   b. Promptly remove all second bunks that have been installed in single occupancy cells at any medium, close, or maximum security prison facility;

3. Make a finding that defendants' practice of assigning more than one prisoner to a single occupancy cell in any Existing Facility constitutes contempt of court;

4. Direct the magistrate Judge to conduct a scheduling conference to establish a discovery schedule for ascertaining the parameters of defendants' violations of the 1991 settlement agreement and for determining the compensatory relief that members of the plaintiff class should receive to remedy those violations;

5. Direct the United States Magistrate Judge to establish a discovery schedule for determining the scope of the violation of the Court's orders and the harms experienced by the class members

6. Set a future date for an evidentiary hearing at which plaintiffs can present to the Court the evidence of the harms suffered by the plaintiff class due to defendants' violations of the Court's orders;

7. Award members of the plaintiff class compensatory remedial relief that will compensate them for the harms they have suffered as a result of defendants' contempt of court;

8. Award the plaintiff class their attorneys fees and costs for reasonable and necessary work related to these matters; and

9. Grant whatever additional relief the Court deems just and proper.

Respectfully submitted

/s/ Peter Cubra

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CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2016 I filed the foregoing document electronically through the CM/ECF system, which caused all counsel of record to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

/s/ Peter Cubra